STATE OF MICHIGAN

COURT OF APPEALS

ADRIENNE ROBERTS,

Plaintiff-Appellant,

v

DETROIT PUBLIC SCHOOLS, DETROIT BOARD OF EDUCATION, DR. KENNETH BURNLEY, DR. KAY E. ROYSTER, and CURT N. SAWYER,

Defendants-Appellees

UNPUBLISHED
January 18, 2007

No. 269414
Wayne Circuit Court
LC No. 04-401641-CK

Before: Saad, P.J., and Cavanagh and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendants Detroit Public Schools, the Detroit Board of Education, Dr. Kenneth Burnley, and Dr. Kay Royster.[1] We affirm.

This action arises from plaintiff's termination as principal of the Phoenix Academy, a middle school in Detroit, because of alleged improprieties with respect to the administration of the Michigan Educational Assessment Program (MEAP) test to students. Plaintiff alleges that she was first notified of the allegations against her in October 2000. In February 2001, she was suspended with pay pending further investigation of the allegations. Plaintiff alleges that in April 2001, she was summoned to a meeting with Dr. Royster and given the choice of resigning or being fired. She alleges that she resigned from her position under duress, under circumstances that amounted to a constructive discharge.

Plaintiff's amended complaint included several different claims. Defendants moved for summary disposition of each of the claims under MCR 2.116(C)(7), (8), and (10), and the trial court granted defendants' motion.

[1] Plaintiff also named as a defendant Curt Sawyer, but he was dismissed shortly after this action was filed. Plaintiff does not challenge the trial court's dismissal of Sawyer. As used in this opinion, the term "defendants" refers only to defendants Detroit Public Schools, Detroit Board of Education, Dr. Burnley, and Dr. Royster.

I

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred because of immunity granted by law or by the statute of limitations.

> A defendant who files a motion for summary disposition under MCR 2.116(C)(7) may (but is not required to) file supportive material such as affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). If such documentation is submitted, the court must consider it. MCR 2.116(G)(5). If no such documentation is submitted, the court must review the plaintiff's complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff. [*Turner v Mercy Hosp & Health Services of Detroit*, 210 Mich App 345, 348; 533 NW2d 365 (1995).]

"If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred." *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000).

A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

II

Plaintiff first argues that the trial court erred in dismissing count I of her complaint based on the statute of limitations. Plaintiff asserts that the trial court erroneously characterized count I as alleging a claim for defamation, which is governed by a one-year period of limitations, MCL 600.5805(9), instead of a claim for violation of the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq*., which is governed by a three-year period of limitations. We find no error.

Initially, we find no merit to plaintiff's assertion that any statute of limitations defense was waived because defendants did not plead it as an affirmative defense. The record discloses that defendants raised the statute of limitations as an affirmative defense in their answers to both plaintiff's original complaint and her amended complaint. Therefore, the defense was not waived. See *Citizens Ins Co of America v Juno Lighting, Inc*, 247 Mich App 236, 241; 635 NW2d 379 (2001).

Count I of plaintiff's amended complaint alleged a claim for "infringement under liberty interest of Fifth and Fourteenth" Amendments. The allegations forming the basis of this claim are as follows:

136. The Detroit School Board is a State of Michigan or governmental agency exercising powers delegated by statute.

137. Plaintiff has a liberty interest in her good name and professional reputation learned [sic, earned] over 22 years as a professional educator.

138. That highly negative and stigmatizing material accusing Plaintiff of professional misconduct, as well as professional incompetence, was publicly disclosed or disseminated by Defendants at a time when Defendants had initiated measures to terminate Plaintiff 's employment as principal of Phoenix Academy.

139. In context, the action were [sic, was] defamatory and greatly harmed her professional reputation.

140. That Plaintiff was terminated from her employment as a principal by means of a constructive discharge and not rehired based upon the stigmatizing remarks disseminated by Defendants.

141. That DPS' action in charging Plaintiff with dishonesty, or other unethical or unprofessional behavior with respect to the administration of the MEAP test has stigmatized Plaintiff 's reputation within the educational community, and at large.

142. That the stigma created by the Board has attached firmly to Plaintiff and has hampered her future employment prospects, or otherwise reduced her earning ability or potential.

"In determining whether an action is of a type subject to a particular statute of limitation, we look at the basis of the plaintiffs' allegations." *Ins Comm'r v Aageson Thibo Agency*, 226 Mich App 336, 342-343; 573 NW2d 637 (1997). "The type of interest allegedly harmed is the focal point in determining which limitation period controls." *Id*. at 343.

A claim for defamation consists of the following elements:

> (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication. [*Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005).]

The limitations period for defamation is one year. MCL 600.5805(9).

A claim for discrimination under the CRA requires proof of discriminatory treatment by an employer. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003). The statute of limitations for discrimination claims is three years, MCL 600.5805(10). *Magee v DaimlerChrysler Corp*, 472 Mich 108, 113; 693 NW2d 166 (2005). The

claim accrues on the date the plaintiff is discharged. *Parker v Cadillac Gage Textron, Inc*, 214 Mich App 288, 290; 542 NW2d 365 (1995).

The gravamen of plaintiff's allegations in count I is that defendants publicly disclosed defamatory statements about her. Contrary to what plaintiff asserts on appeal, nothing in the allegations suggest that plaintiff is alleging a claim based on wrongful discharge for racial or religious discrimination, or some other claim for discrimination under the CRA. The trial court properly concluded that plaintiff's claim is most closely analogous to a claim for defamation and, therefore, is governed by a one-year period of limitations.

Plaintiff argues that even if her claim is characterized as one for defamation, it is not barred by the statute of limitations because defendants continued to repeat the statements, which continue to be available on the Internet. The statute of limitations begins to run when a claim first accrues, MCL 600.5805(1), and a defamation claim accrues when "the wrong upon which the claim is based was done regardless of the time when damage results." *Mitan*, *supra* at 24-25, quoting MCL 600.5827. Thus, the Legislature has clearly provided that a claim for defamation must be filed within one year after the claim first accrues, and republication does not extend the period for filing the claim. *Id*. at 25.

Here, plaintiff concedes that the article accusing her of improper conduct was first published in 2001. Plaintiff did not file this action until 2004. Thus, defendants were entitled to summary disposition of plaintiff's count I under MCR 2.116(C)(7). The trial court did not err in dismissing this claim.

III

Plaintiff next argues that the trial court erred in dismissing count II of her amended complaint. We conclude that summary disposition of this claim was proper under MCR 2.116(C)(10).

In count II, plaintiff alleged that defendants breached their duty to conduct a fair and just investigation under the state constitution. Const 1963, art 1, § 17, provides:

> No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. *The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.* [Emphasis supplied.]

The fair and just treatment clause was added to the 1963 constitution. The convention comment explaining the addition of this clause provides:

> This is a revision of Sec. 16, Article II of the present [1908] constitution. The second sentence incorporates a new guarantee of fair and just treatment in legislative and executive investigations. This recognizes the extent to which such investigations have tended to assume a quasi-judicial character.

> The language proposed in the second sentence does not impose categorically the guarantees of procedural due process upon such investigations. Instead, it leaves to the Legislature, the Executive and finally to the courts, the task of developing fair rules of procedure appropriate to such investigations. It does, however, guarantee fair and just treatment in such matters.

The allegations in count II of plaintiff's complaint are limited to the fair and just treatment clause. Plaintiff did not include any allegations regarding her right to due process. In arguing this claim on appeal, however, plaintiff focuses on due process standards. Because due process protections and the fair and just treatment clause are separate rights, and the former does not define the latter, plaintiff's reliance on due process standards is misplaced.

Plaintiff principally relies on *Hortonville Joint School Dist No 1 v Hortonville Ed Ass'n*, 426 US 482, 488, 496-497; 96 S Ct 2308; 49 L Ed 2d 1 (1976), but the Court in that case applied the Due Process Clause of the Fourteenth Amendment to hold that striking teachers failed to establish that a school board's decision to terminate their employment was infected by such bias that the board should have been disqualified as the decisionmaker as a matter of due process. Because *Hortonville* is based on due process protections only, and the Court concluded in any event that a school board is not necessarily so biased to act as an impartial decisionmaker as a matter of due process, that case does not aid plaintiff's position here that she was not afforded fair and just treatment by an impartial decisionmaker.

In any event, even if we were to credit plaintiff's argument that fair and just treatment required that the investigation of this matter be conducted by someone other than the person making the ultimate decision, plaintiff has not shown a violation in this regard. Plaintiff concedes that the investigation of this matter was conducted by Dr. John Telford and Lynne Metty, both school district officials, as well as Aaron Hedgepeth, Linda Leddick, and Juanita Clay-Chambers. That group recommended that plaintiff be suspended for three days without pay and transferred. There is no dispute that it was Dr. Royster who made the ultimate decision regarding plaintiff's continued employment. Although the investigators worked for the school district, this alone does not establish that the investigation was not fair and just. An internal investigation by school district employees was not inherently unfair as a matter of law.

Although plaintiff alleged in her complaint that the investigation was flawed, she has not produced any evidence in support of this allegation. Moreover, her allegations in count II relate only to the investigation of this matter, not any hearings that were conducted.

The remainder of plaintiff's argument relates not to fair and just treatment, but due process protections. Because count II does not allege a due process violation, and because the due process doctrine does not define the fair and just treatment clause, we conclude that plaintiff has not shown that summary disposition of this claim was improper.

IV

Plaintiff next argues that the trial court erred in dismissing her claim for intentional infliction of emotional distress. We disagree.

As this Court explained in *Graham v Ford*, 237 Mich App 670, 674-675; 604 NW2d 713 (1999):

> In order to invoke the tort of intentional infliction of emotional distress . . . , plaintiffs had to establish (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Haverbush v Powelson*, 217 Mich App 228; 551 NW2d 206 (1996). Liability for the intentional infliction of emotional distress has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. *Doe v Mills*, 212 Mich App 73, 91; 536 NW2d 824 (1995). Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. *Id*. It is not enough that the defendant has acted with an intent that is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation that would entitle the plaintiff to punitive damages for another tort. *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602-603; 374 NW2d 905 (1985), quoting Restatement Torts, 2d, § 46, comment d, pp 72-73. In reviewing a claim of intentional infliction of emotional distress, we must determine whether the defendant's conduct is sufficiently unreasonable as to be regarded as extreme and outrageous. *Doe*, *supra* at 92. The test is whether "the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" *Roberts*, *supra* at 603. [*Graham*, *supra*.]

It is initially for the trial court to determine whether the defendant's conduct may reasonably be regarded as so extreme and outrageous to permit recovery. *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 582; 603 NW2d 816 (1999). Where reasonable individuals may differ, it is for the jury to determine if the conduct was so extreme and outrageous to permit recovery. *Id*.

In this case, plaintiff has not established factual support for the first element of a claim for intentional infliction of emotional distress, i.e., that defendants engaged in extreme and outrageous conduct. The evidence showed that defendants conducted an investigation after being presented with allegations of fraud or cheating by plaintiff with regard to the MEAP. Plaintiff failed to present any evidence in support of her claims that defendants prompted children to falsely accuse plaintiff of wrongdoing or that defendants were extremely abusive. The trial court properly dismissed this claim pursuant to MCR 2.116(C)(10).[2]

[2] Plaintiff also argues that the trial court erred in dismissing this claim based on governmental immunity, but the record does not disclose that the trial court dismissed this claim on that ground.

V

Plaintiff also argues that the trial court erred in dismissing her CRA claim alleging racial and religious discrimination. We disagree.

Contrary to what plaintiff argues, the trial court did not dismiss this claim based on governmental immunity. Although the court stated that Dr. Burnley and Dr. Royster could not be individually liable under the CRA, that decision was based on this Court's decision in *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464, 478-485; 652 NW2d 503 (2002), not governmental immunity. We agree that the trial court erred to the extent that it determined that Dr. Burnley and Dr. Royster could not be individually liable for a civil rights violation as a matter of law. See *Elezovic v Ford Motor Co*, 472 Mich 408, 416, 425; 697 NW2d 851 (2005) (overruling *Jager*). Nonetheless, summary disposition of plaintiff's discrimination claim was proper under MCR 2.116(C)(10), because plaintiff failed to establish a prima facie case of discrimination.

To prove a prima facie case of discrimination based on disparate treatment, plaintiff was required to show that she was treated differently than a similarly situated member of a different race or different religion. *Betty v Brooks & Perkins*, 446 Mich 270, 281; 521 NW2d 518 (1994). Plaintiff, who is Caucasian and of the Jewish faith, maintains that she was treated differently than her assistant principal, who is an African-American and not Jewish. We disagree. Because of their different positions, the two were not similarly situated. Further, there is no support in the record for plaintiff's claim that the assistant principal was not disciplined and instead promoted after the investigation of this matter. On the contrary, the evidence showed that after the school year ended, the assistant principal lost her position, was demoted to a lesser position, and transferred to another school. Further, the evidence showed that, unlike plaintiff, the assistant principal was not directly implicated in the allegations of improper conduct. For these reasons, plaintiff has failed to show that she was treated differently than a similarly situated person of a different race and religion. Because plaintiff failed to present any other evidence to support her claim of race and religious discrimination, this claim was properly dismissed under MCR 2.116(C)(10).

VI

Plaintiff also argues that the trial court erroneously dismissed her claim for constructive discharge. We disagree.

"A constructive discharge occurs when an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation." *Hammond v United of Oakland, Inc*, 193 Mich App 146, 151; 483 NW2d 652 (1992). The conduct of the employer or its agent must be so severe that a reasonable person in the employee's place would feel compelled to resign. *Champion v Nationwide Security, Inc*, 450 Mich 702, 710; 545 NW2d 596 (1996). A plaintiff who establishes that she was constructively discharged is treated as if the employer actually fired her. *Id.*

Although plaintiff alleged a claim for constructive discharge as a separate independent cause of action, constructive discharge is not a cause of action in itself. Rather, it merely provides a plaintiff with a defense against an argument that she does not have a cause of action

for wrongful discharge because she voluntarily left her job. *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 487; 516 NW2d 102 (1994). Therefore, where a plaintiff claims that she was constructively discharged, she must have an underlying cause of action for wrongful discharge. *Id*.

In this case, plaintiff has not established an underlying claim for wrongful discharge. Therefore, the trial court did not err in dismissing this claim.

VII

Finally, plaintiff argues that neither Dr. Burnley nor Dr. Royster are entitled to qualified immunity. The parties did not discuss how qualified immunity applied to this case in their briefs below, and the trial court never addressed this issue. Thus, the issue is not preserved. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512-513; 667 NW2d 379 (2003). Further, having found no merit to plaintiff's arguments on appeal, consideration of this issue is not necessary.

Affirmed.

/s/ Henry William Saad
/s/ Mark J. Cavanagh
/s/ Bill Schuette